

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

DAVIDSON HOTEL COMPANY, LLC
(CHICAGO MARRIOTT AT MEDICAL
DISTRICT/UIC)

Employer,

and

UNITE HERE, LOCAL 1

Petitioner.

Case Nos. 13-RC-217485
13-RC-217487

**REQUEST FOR REVIEW OF THE RD'S SUPPLEMENTAL
DECISION ON OBJECTIONS AND DECISIONS AND
DIRECTIONS OF ELECTIONS**

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Jay P. Krupin
Peter G. Fischer
Michael Parente
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Ave. NW
Washington, DC 20036-5403

*Attorneys for Employer
Davidson Hotel Company, LLC*

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Pursuant to National Labor Relations Board (“NLRB” or “Board”) Rules and Regulations 102.67(c), (d) and 102.69(c), the Davidson Hotel Company, LLC (Chicago Marriott at Medical District/UIC) (“Hotel” or “Employer”) respectfully requests review of the RD’s (“RD”) Supplemental Decision and Certification of Representation to the Hearing Officer’s Report on Objections to the Election issued in the above-captioned case on August 28, 2018¹ (“Decision on Objections”), as well as the RD’s Decision and Direction of Election issued in 13-RC-215485 and 13-RC-215487 on April 23, (collectively the “Direction of Elections”).² Compelling reasons exist for granting review. In support thereof, the Employer hereby states:

I. OVERVIEW

In this case, the RD put form over substance in directing representation certification elections for the same employee group that he ruled as inappropriate only a few weeks before. Specifically, on March 2, Petitioner UNITE HERE, Local 1 (the “Union” or “Petitioner”) filed a petition seeking to represent the employees in the Hotel’s Housekeeping Department and Food and Beverage (“F&B”) Division. The RD dismissed the petition because it was a fractured unit inasmuch as it included only a portion of the Employer’s Rooms Division and was therefore inappropriate.³ One day after the dismissal, the Union filed two petitions *seeking to represent the exact same Hotel employees*, and a combined pre-election hearing was held on April 9.

Rather than dismiss the Union’s thinly veiled attempt at thwarting the Board’s community of interest standard, the RD made the strange decision to hold two separate elections as a remedy for what he ruled to be an improperly gerrymandered unit sought at this small functionally integrated hotel operation. The re-filing proved to be a hollow procedural move since these two

¹ All dates refer to 2018 unless otherwise noted.

² The Decision on Objections is attached hereto as Exhibit 1. The Decision and Direction of Election issued in 13-RC-215485 and 13-RC-215487 are attached as Exhibits 2 and 3, respectively.

³ The Employer’s Rooms Division is comprised of the Front Desk and Housekeeping Departments.

supposedly separate elections were ultimately held in the same room, at the same time, with the same Board agents, under a consolidated administrative process, with the Union's stated intent (both before and after the election) to represent these two micro-units as one consolidated bargaining group. Thus, it appears that the Union is attempting to side step the Board's *PCC Structural*s community of interest standards with a procedural slight-of-hand, and the RD has sided with their attempt at doing so in error. The representation certification that resulted is improper because it is the very same inappropriate bargaining unit that the RD himself dismissed at this very same Employer only a day before the two petitions at issue here were filed.

The Board should overturn the RD's decision to direct elections for these two inappropriate units. The Direction of Elections departed from the mandated analytical framework set forth in *PCC Structural*s by sanctioning the same unit that the RD found inappropriate just weeks earlier. In doing so, the RD extinguished the rights of the Hotel's excluded employees – who he just found to share a community of interest with included employees – and returned to a *Specialty Healthcare* standard where the petitioned-for unit is controlling. The RD also erroneously applied the traditional community of interest standard resulting in prejudicial error to the Hotel. Further, the RD departed from established Board precedent when rejecting the Employer's argument that the petitioned-for units were barred by the "six-month petition bar" since the petitioned-for units comprised the exact same unit the RD had found inappropriate weeks earlier.

After the Union prevailed in both elections, the Hotel filed timely objections. During the election campaign, the Union engaged in conduct that interfered with employee free choice, destroyed laboratory conditions, and compromised the election. The Hotel's objections can be summarized as follows: (1) the units inappropriately included statutory supervisors; (2) pro-union conduct by statutory supervisors tainted the outcome of the election; and (3) a determinative

amount of employees were promised gifts of material value.

In fact, one of the lead union organizers was the unquestioned management authority in the Housekeeping Department. Specifically she had authority to discipline, direct, and assign work, including adjusting the workload for Room Attendants. Importantly, sworn testimony was adduced that this same Housekeeping Supervisor pressured RAs, the largest contingent of employees voting in either election, to participate in the organizing campaign and sign cards. The RD committed a clear error in ruling that the Housekeeping Supervisor was not a “Supervisor” under Section 2(11) of the Act, and by ignoring the unrebutted influence that this Housekeeping Supervisor had in improperly driving the Union’s organizing campaign.

The RD adopted the Hearing Officer’s Report that erroneously rejected the Hotel’s objections and issued a certification of representative. As such, the Employer respectfully requests that the Board grant this Request for Review because substantial questions of law and/or policy exist regarding the following:

1. The legality of the units based on a departure from Board precedent and clearly erroneous factual determinations that prejudiced the Hotel;
2. The legality of the Housekeeping Unit based on the departure from established Board precedent and clearly erroneous factual determinations that prejudiced the Hotel;
3. The legality of the units based on a departure from the Board’s precedent on other hospitality-unit determinations;
4. The departure from Board precedent in rejecting that the Union’s petitions were not barred when it filed petitions for the same unit less than a week after it was found inappropriate;
5. The legality of the unit based on a departure from Board precedent and a disregard of facts in establishing that the Housekeeping Supervisor and Banquet Captain were not

supervisors under the National Labor Relations Act (the “Act”);

6. The validity of the election, by departing from Board precedent and disregarding facts in finding that the Housekeeping Supervisor and Banquet Captain’s pro-union conduct did not unlawfully taint the representation election; and

7. The validity of the election, by departing from Board precedent and disregarding undisputed facts in finding that the promise of gifts of material value to a determinative number of Housekeeping Employees did not unlawfully interfere with employee free choice, destroy laboratory perfect conditions, and compromise the election.

II. PROCEDURAL BACKGROUND

A. The RD Dismissed the Union’s Initial Petition Finding Hotel Employees’ Interests Not Sufficiently Distinct (Case No. 13-RC-215790).

On March 2, Petitioner filed a petition seeking to represent “all regular part-time and full-time F&B employees and housekeeping employees (including room attendants, housemen and house ladies, lobby attendants, housekeeping supervisors, cooks, dishwashers, servers, hosts/hostesses, bartenders, banquet servers and bussers).” (Exhibit 4, 13-RC-215790 Decision and Direction of Election). Essentially, the petition sought to represent all of the Hotel’s F&B Division and only half of the Rooms Divisions – the Housekeeping Department. The Employer objected that the petitioned-for unit was a fractured unit because it included only a portion of the Employer’s Rooms Division, thereby interrupting the functional integration between departments at this small property. (*Id.*)

The Region held a pre-election hearing on March 14. Based on the testimony and evidence adduced at the hearing, the RD agreed that the Union’s petitioned-for unit was inappropriate. Applying *PCC Structural*s, the RD held “that the interests of front desk employees that the [Union] seeks to exclude are not sufficiently distinct from the interests of employees in the petitioned-for

unit to warrant establishment of a separate unit.” (*Id.*)⁴ The Union declined to proceed on an alternative unit, and the Region dismissed the petition as an inappropriate unit on March 29. (*Id.*)

B. The Union Filed Subsequent Petitions Seeking to Represent the Exact Same Employees that the RD Already Found Inappropriate.

One day after the dismissal on March 30, the Union filed two petitions seeking to represent the exact same employees that the RD had just dismissed. In an attempt to sidestep *PCC Structural*s and the RD’s decision, the Union filed one petition seeking to represent the Hotel’s Housekeeping Department employees (including room attendants, housekeeping supervisors, laundry attendants, and house persons) (Case No. 13-RC-215485), and one petition seeking to represent the Hotel’s F&B Division employees (including dishwashers, cooks, outlet servers, room service servers, banquet servers, banquet captains, bartenders, and lounge attendants) (Case No. 13-RC-215487). The petitioned-for units *comprised the exact same unit of employees already dismissed* by the RD. The Region consolidated the two petitions into a single process, *sua sponte*, and held a consolidated pre-election hearing on April 9. (*Id.*) The record from the prior petition, Case No. 13-RC-215790, was incorporated into the record for the two subsequent consolidated petitions. (*Id.*)

At the consolidated hearing, the Employer again argued that petitioned-for units, involving the same employees that was previously dismissed, were not appropriate. Specifically, and congruent with the RD’s analysis in the original petition, any appropriate unit would have to include all of the Rooms Division (the Housekeeping and Front Office Department) and all of the F&B Division. (Exs. 2, 3, p. 2). The Employer further contended that even if the F&B employees

⁴ In rendering the direction of election, the RD set forth the chain of events leading to this Request for Review by proposing an erroneous solution to the Union’s community of interest issue. The RD’s footnote dicta improperly sanctioned the idea of separate petitioned-for units of Housekeeping and F&B employees. It was this unsolicited and incorrect advice that may have prompted the Union to file two petitions.

were found not to share a community of interest with the petitioned-for Housekeeping Department, any appropriate unit of Housekeeping employees must encompass the entire Rooms Division (i.e. including the Front Office Department). (Ex. 2, p. 2). Also, the Employer argued that the petitions were barred by the six-month “petition-bar doctrine.” (Exs. 2, 3, p. 2 fn. 5).

In essence, at the April 9 hearing, the very same issues were in question on the same factual record for the same employees. However, contrary to the prior RC decision, the RD rejected the Employer’s arguments and ordered a consolidated election for both units. (*Id.* at p. 17). To this end, the RD ordered the elections to take place on the same date, at the same time and locations, in the same room, using the same eligibility period and administrative process. (*Id.* at pp. 17-19).

C. Election, Post-Election Challenges and Certification of the Same Bargaining Unit that the RD Initially Found to be Inappropriate.

The Union prevailed in both Board supervised elections on May 2. The Employer filed timely objections on May 8, seeking to set aside the election. On May 23, the Region held a hearing on the Employer’s objections. (Exhibit 5, Hearing Officers Report on Objections). The Employer objected that flagrant pro-union supervisory conduct tainted the elections, and the Union’s promise of gifts of material value interfered with employee free choice and compromised the laboratory-perfect conditions the Board requires. (*Id.*) The Employer also argued that Housekeeping Supervisor Edilvia Bucio and Banquet Captain Santana Hernandez were statutory supervisors and could not be included within the petitioned-for units. (*Id.*)

On July 19, the Hearing Officer’s Report on Objections denying the Employer’s objections was issued. (*Id.*) The Employer filed timely exceptions on August 2. The RD issued a Supplemental Decision and Certification of Representative on August 28, confirming the Hearing Officer’s Report on Objections and certifying the Union as the bargaining representatives of the same group of employees the RD initially found to constitute an inappropriate unit. (*See*, Ex. 1).

III. FACTUAL BACKGROUND

A. The Hotel's Operation

The Hotel is a small 113-room full-service hotel located across the street from the Rush Medical Center in Chicago, Illinois. (Ex. 6, 13-RC-215790 Pre-Election Hearing at 22:20-23:6). The Hotel is one the smallest full-service hotels in Chicago. (*Id.* at 23:20-24:5). The Hotel provides traditional lodging, bell and valet services, as well as restaurant, room service, and banquet operations. (*See*, Ex. 2, 3). Each function works together to provide Hotel guests with a seamless experience. (Ex. 6, 50:6-19; 60:18-61:2).

Ben Joseph (“Joseph”) is the Hotel’s General Manager. (Exs. 2, 3, p. 2). As the General Manager, Joseph oversees all Hotel operations. (*Id.*) He implements and approves all Hotel policies. (Ex. 2, p. 2). He interviews and has final say over the hiring of all “guest-facing” employees including Servers, Room Service Servers, Room Attendants (“RAs”), Front Desk Agents (“Agents”), Night Auditors, Housepersons, and Bellstaff.⁵ (*See*, Ex. 4, p. 2; Ex. 6, 95:20-96:22). He also approves all departmental schedules. (Ex. 7, Consolidated Pre-Hearing Transcript, at 18:2-3).

Joseph is at the Hotel 50-84 hours a week. (Exs. 2, 3, p. 3). While there, Joseph serves as the “Manager on Duty” and has final say on all employee and guest-related decisions. (Ex. 7, 16:18-25). Since it is a smaller hotel, with no more than 22 employees working at any given time, Joseph supervises and interacts with all employees daily. (Ex. 7, 16:20-18:25). When not at the Hotel, the other departmental managers rotate as the “Manager on Duty” and exercise control over employee and guest related decisions. (Ex. 7, at 64:3-65:18).

In addition to Joseph’s oversight, all Hotel employees are subject to the same terms and

⁵ The only employees Joseph does not interview are LAs, Cooks, and Dishwashers.

conditions of employment. All employees have the same handbook and undergo the same employee orientation. (Exs. 2, 3, pp. 7-8.) The Hotel pays all employees bi-weekly using the same payroll system. (*Id.* at p. 9). All employee schedules are based on Hotel occupancy and events. (Ex. 4, p. 6.) All employees have the same fringe benefits, vacation time, holiday, time clock, clock-in procedures, locker rooms, cafeteria, parking privileges, nametags, and sick time. (*Id.*) Further, the Hotel has a centralized personnel department that handles recruitment training, recordkeeping, and administration of personnel policies. (Ex. 6, at 52:9-20).

B. The Front Office Department.

The Front Office is half of the Rooms Division and includes the Hotel's front desk and bell employees. (Ex. 6, at 50:20-17.) When a guest arrives at the Hotel, Bellstaff greet them and assist with carrying their luggage to their room. (*Id.* at 26:16-27:18.) Bellstaff park cars and operate the Hotel's shuttle. (*Id.*) Guests check in at the front desk. (*Id.* at 28:20-29:4.) An Agent or Night Auditor assigns the guest a room based on what the RAs have informed them are clean and available. (*See*, Exs. 2 & 3).

1. The Front Desk

The front desk is the "nerve center" of the Hotel. (Ex. 6, at 29:5-9.) It is the primary point of guest contact and where the Hotel routes all communication for its operations. (Ex. 2, p. 4-5). Because of the small boutique nature of the property, guests contact the front desk when they have any questions or issues. (Ex. 6, 29:7-21). Guest do not have the ability to contact the housekeeping department. (*Id.* at 126:22-127:19; 141:14-21). Rather, guests must contact the Front Desk who then radios a Houseperson to deliver the amenity (i.e. pillows, blankets, shaving cream, etc.) (*Id.*) Agents and Housepersons are among the only hourly employees who regularly carry radios so that they can remain in close communication. (*Id.* 100:24-101:2; 127:12-16; Ex. 7, 26:9-27:5). This interaction happens multiple times per day. (Ex. 6, 141:14-21; 147:1-4). If the Houseperson is not

available, or it is after the Houseperson has left, an Agent or a Bell employee delivers the amenity. (*Id.*) Likewise, if an RA needs something to assist in their duties of cleaning guest rooms, they use the guest's room phone to contact an Agent. (Ex. 7, 26:9-20). An Agent then radios the Houseperson to deliver the supplies to the RA. (*Id.*)

Housekeeping employees must inform the front office of what rooms are clean and available. (Ex. 6, 99:4-8). To inform the front desk that a room is clean, RAs either call and inform the Agents or punch a code into the guest phone so the Agent can see the room has been cleaned on their computer. (*Id.* at 100:6-23). RAs also complete an accounting of what rooms are clean and available that is returned to the front desk at the end of each day. (*Id.* at 171:8-173:22). Without this communication, Agents would not be able to assign guests to rooms.

Agents also assist Housekeeping and F&B employees. If a guest complains that their room is not clean and ready, an Agent handles the complaint by issuing the guest a drink voucher or attempts to otherwise accommodate the guest. (*Id.* at 142:2-7). Additionally, if the sole Room Service employee does not answer a room service call, an Agent will take the room service order and deliver the order to the F&B employees. (Ex. 6, 130:2-16). Finally, some guests of the Hotel receive special amenities such as a fruit basket, chocolate covered strawberries, or other perishable items for their birthday or other special occasions. (*Id.* at 149:21-150:21). An Agent contacts the Room Service Server, coordinates the delivery of these items, and provides the Room Service Server with a room key. (*Id.* at 149:14-150:21; 170:16-18).

Night Auditors perform a special function within the Hotel. When the Night Auditor arrives at about 10:30 p.m., they are the only employee at the Hotel except for security. (*Id.* 164:14-165:4). The Night Auditor is essentially the manager on duty and responsible for all guest requests and issues. (*Id.*) Specifically, the Night Auditor may have to clean a guest room, deliver an amenity,

pass special instructions to Housekeeping the next day, or assist with any other guest request. (*Id.*)

Night Auditors also begin the “Rooms Exception Report.” (Ex. 7, 63:11-65:6). The Rooms Exception Report is provided by the Night Auditor to Housekeeping each morning. (*Id.*) The form tracks Hotel occupancy and any rooms not cleaned by RAs. (*Id.*) The Rooms Exception Report allows the Front Desk and Housekeeping to know what rooms RAs cleaned and what rooms are available. (*Id.*) At the end of the day, Housekeeping delivers the Rooms Exception Report back to the front desk with an accounting showing what rooms are available at the Hotel. (*Id.*)

2. Bellstaff

Bellstaff perform traditional bell and valet duties. Bellstaff carry luggage and parks cars. (Ex. 6, 27:5-18). Bellstaff assist when a guest requests a room change. (*Id.* at 147:5-18). Additionally, Bellstaff assist the Housekeeping Department by cleaning the Hotel’s front door area and porte-cochere in conjunction with the Housepersons. (*Id.* at 125:2-9). Bellstaff further assist Housekeeping by checking the status of rooms and by delivering amenities to guests. (*Id.* at 142:11-143:10; 151:6-14). After the Houseperson leaves mid-day, Bellstaff or Agents deliver amenities to guest rooms. (*Id.*, at 127:21-128:1; Ex. 3, p. 4).

Bellstaff are scheduled based on Hotel occupancy and banquet events. (Ex. 6, 28:5-11; 79:6-18). When there is an increased volume of banquet events at the Hotel, the Hotel schedules additional Bellstaff to accommodate the additional patrons at the Hotel. (*Id.* at 79:6-18).

C. Housekeeping Department

The Housekeeping Department is the other half of the Hotel’s Rooms Division and is comprised of RAs, Housepersons, and Laundry Attendants (“LAs”). RAs clean guest rooms. (Ex. 2, pp. 3-4). RAs work closely with the Front Desk to coordinate assigning guests to rooms.

Housepersons work throughout the Hotel maintaining its cleanliness. (Ex. 2, p. 4). Housepersons work closely with Agents to deliver items to guests and RAs. (Ex. 6, 145:3-15).

Houspersons also perform overlapping work with the Bellstaff by cleaning the front entrance and porte-cochere and by delivering amenities to guest rooms. (*Id.* at 125:2-9; 145:3-15). Additionally, Housepersons work closely with the Banquet staff during events, refreshing banquet areas as necessary. (Ex. 7, 24:19-24).

Finally, LAs wash and dry linens for Housekeeping and F&B. (Ex. 6, 41:9-42:2). F&B employees frequently contact LAs during the day when dropping off and picking up linen. (*Id.*)

D. F&B Division

The F&B Division consists of the Hotel's kitchen, restaurant, and banquet operations. Each operation has its own schedule, distinct job functions and supervisor. (Ex. 6, 111:16-112:8; Ex. 3, pp 3-4). The F&B Manager is Ricardo Morales. (Exhibit 8, Consolidated Objection Hearing Transcript, at 185:5-6). The Hotel's kitchen includes cooks and dishwashers who report to Manuel Garcia. (Ex. 6, at 111:16-22). The kitchen performs traditional kitchen duties and prepares the food for the Hotel's restaurant and banquets. (Ex3, p. 4). Kitchen employees also clean and serve food in the Hotel's employee cafeteria. (Ex. 6, 90:12-92:17).

Restaurant and room service employees serve food and report to Restaurant Supervisor Gordona Malekic. (*Id.* at 82:6-13). One hundred percent of in-room dining and 95% of restaurant revenue is generated by guests staying at the Hotel. (Ex. 7, 27:8-14). The restaurant relies on the Hotel's LAs to service and provide clean linens. (Ex. 6, 41:6-22).

Banquet employees staff banquet events and report to Banquet Captain Santana Hernandez. (Ex. 8, 28:13-24). During banquet events, the Hotel relies on Housepersons to clean and refresh the area, Bellstaff to valet cars, and Agents to act as a cashier for valet services. (Ex. 7, 24:1-24).

E. Disputed Supervisors

1. Housekeeping Supervisor Ediliva Bucio

Rosemerie Rodriguez ("Rodriguez") is the Hotel's Housekeeping Manager. (Ex. 8, 17:16-

18). On weekdays, she is responsible for the Housekeeping Department. (*Id.* at 23:7-10). On weekends, Housekeeping Supervisor Edilvia Bucio (“Bucio”) serves in this capacity and has all of the same responsibilities and duties that Rodriguez has during the week. (*Id.* at 23:11-26:1.)

When Rodriguez and Bucio serve as the Housekeeping Managers their duties include: opening the Department; assigning rooms to RAs; inspecting RAs’ work; directing and adjusting RAs’ workload throughout the day; leading daily departmental meetings; directing RAs and Housepersons to remedy issues raised by guests; and responding to Hotel needs by facilitating the cleaning of rooms by RAs as necessary. (*Id.* at 17:19-26:1; 37:24-38:22, 105:16-106:1).

Each morning, either Rodriguez or Bucio assigns RAs their rooms for the day – also known as their “board,” which tells the RA what rooms to clean, whether the guest in the room is checking out, and what time the room can be cleaned. (*Id.* at 17:19-18:4; 19:8-17). Assigning boards requires Rodriguez or Bucio to consider numerous factors including whether a room is a stayover or a checkout, a do-not-disturb (“DND”),⁶ double or single bed, the number of floors an RA would have to travel, and the RA’s preferred section. (*Id.* at 17:19-18:4; 20:8-13; 39:6-16). Prior to arriving each day, neither Rodriguez nor Bucio knows what the room assignments for any of the RA will be for the day. (*Id.* at 108:11-15).

2. Banquet Captain Santana Hernandez

Banquet Captain Santana Hernandez is the head of the Hotel’s banquet operation. (Ex. 8, 28:13-24). Hernandez is responsible for scheduling employees and directing them during events, ensuring appropriate coverage for the type of function. (*Id.* at 28:25-29:22). Staffing needs vary based on the type and number of events scheduled to occur. (*Id.* at 29:11-19; 65:8-19). For example, some events need only one or two servers, while other events require substantially more

⁶ Stayovers usually take between 15-20 minutes to clean because they do not require vacuuming and changing sheets. (*Id.* at 107:20-108:13). Checkouts typically take 30 minutes and do require vacuuming and changing sheets. (*Id.*)

staff to provide service. (*Id.* at 192:20-25). Hernandez is responsible for selecting which employees will cover each event. (*Id.* at 29:11-22; 64:16-65:19; E. Hearing Ex. 6). Since Hernandez is one of two full-time banquet employees, Hernandez covers events by scheduling employees from other departments, usually the restaurant or the front desk. (*Id.* at 57:2-58:3). When multiple events are occurring simultaneously, Hernandez assigns which employees will work what event. (*Id.* at 65:8-66:1).

During events, Hernandez assigns tasks and directs employees as to to do during an event. (*Id.* at 28:25-29:10; 40:8-21; 65:8-66:1). As Union witness Abel Urbano testified, “[Hernandez] directs it. He directs me to help him out in any way.” (*Id.* at 208:6-9). Urbano went on to explain that Hernandez directs the banquet staff in every aspect of the event. (*Id.* at 208:12-17). Further, Hernandez admitted that he directs the banquet staff, is always responsible for telling employees what to do at a banquet event, and that there is “nobody else.” (*Id.* at 186:5-18).

IV. LEGAL ARUGMENT

The Board grants requests for review “only where compelling reasons exist therefore.” 29 C.F.R. § 102.67(c). Grounds for review include (1) the presence of a substantial question of law or policy that is raised based on the absence of or departure from officially reported Board precedent; (2) the RD’s decision on a substantial factual issue is clearly erroneous on the record and that effort prejudicially affects a party’s rights; or (3) a ruling made in connection with a proceeding resulted in prejudicial error. *Id.* The Board’s review of this decision is warranted.

A. A Substantial Question Exists Concerning the Legality of the Unit Based on the RD’s Departure from the Board’s Precedent and Clearly Erroneous Factual Determinations that Have Prejudiced the Hotel.

The RD’s community of interest analysis and factual finding related thereto are clearly erroneous. The petitioned-for units do not share a community of interest sufficiently distinct from the excluded employees and are inappropriate. Just weeks prior, the RD determined that this exact

group of employees did not have interests sufficiently distinct from the excluded employees to warrant a separate unit. The Union's blatant attempt to sidestep the Board's community of interest requirements and gerrymander a unit is incompatible with established Board law and the language of the Act. In this small, highly integrated Hotel, only a unit comprised of the Hotel's Rooms Division and F&B Division is appropriate. The RD's decision must be reversed.

1. Legal Standard

In *PCC Structural*s, 365 NLRB No. 160 (2017), the Board set forth its standard for determining the appropriateness of a petitioned-for bargaining unit. Specifically, the Board analyzes whether employees in the proposed unit share a community of interest “*sufficiently distinct*” from the interests of employees excluded from the unit to warrant a separate bargaining unit. *Id.* at 11, 13 (quoting *Constellation Brands U.S. Operations, Inc. v. N.L.R.B.*, 842 F.3d 784, 794 (2d Cir. 2016) (emphasis added)). In weighing both the shared *and* the distinct interests of petitioned-for and excluded employees the Board must determine whether “excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.” *Id.*

In making bargaining unit determinations, the community of interest test requires the Board to analyze whether:

whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Id. (quoting *United Operations*, 338 NLRB 123, 123 (2002)). Therefore, as demonstrated below and in the original petition, the analysis set forth under *PCC Structural*s, requires a finding that an appropriate unit must include all of the Hotel's Rooms and F&B employees.

2. The Proposed Units Are Not Sufficiently Distinct

The petitioned-for units do not share a community of interest that is *sufficiently distinct* from the excluded employees to warrant separate units. Rather, the overwhelming evidence establishes that, on a Hotel-wide basis, employees have the same terms and conditions of employment, the Hotel is functionally integrated, employees have frequent contact with each other, and employees perform overlapping work.

a) Identical Terms and Conditions of Employment

All employees in disputed classifications are subject to the same terms and conditions of employment. As found by the RD, all employees at issue have the same handbook, time-clock procedures, employee entrance, employee cafeteria, locker rooms, parking lot, and are required to wear uniforms and name tags. (Ex. 4, p. 6). All employees are paid bi-weekly on an hourly basis via the same payroll system, and undergo the same orientation program. (*Id.* at p. 5-6). Employees receive the same benefits, sick time, vacation time, holidays, and enjoy the same Hotel-provided meals. (*Id.*) Further, all scheduling is based primarily upon hours and has the same call-out procedure. (Ex. 6, 126:6-15). A centralized personal department handles recruitment training, recordkeeping and the administration of personnel policies. (*Id.*, at 52:9-20). Employees review employer announcements, information, and postings on one bulletin board. (*Id.* at 38:22-39:14). The common terms and conditions of employment overwhelmingly support that the petitioned-for units are sufficiently distinct and are thus inappropriate.

b) The Hotel's Employees are Functionally Integrated

It undisputed that the Hotel employees work together to provide highly integrated guest services for benefit of Hotel guests. (Ex. 6, 50:6-19; 60:18-61:2). “[W]hile the employees perform a variety of duties, their common objective is to provide a highly integrated group of services,

directly and indirectly, for the hotel's guests." *Ramada Beverly Hills*, 278 NLRB 691 (1986).

The highly integrated nature of the facility begins with Joseph, the Hotel's General Manager, who oversees all operations at the Hotel. (Exs. 2, 3, pp. 2-3). *Atlanta Hilton & Towers*, 273 NLRB 87, 91 (1984) (centralized management that implements personnel policies and has final control over departments supports single unit); *Ramada Beverly Hills*, 278 NLRB at 692 (same). Joseph implements and approves all Hotel policies. (Ex. 2, p. 2). He interviews and has final say over the hiring of all "guest-facing" employees including Servers, RAs, Agents, Housepersons, Bellstaff, and banquet employees. (Ex. 4, p. 2; Ex. 6, 95:20-96:22). He approves all departmental schedules. (Ex. 7, 18:2-3). A centralized personnel department handles recruitment, training, recordkeeping, and the administration of personnel policies. (Ex. 6, 52:9-20).

While working at the Hotel, anywhere from 50-84 hours per week, Joseph serves as the Manager on Duty and has final say on all employee and guest-related decisions. (Ex. 7, 16:18-25; Exs. 2, 3, p. 3). Joseph also supervises and interacts with all employees every day. (Ex. 7, 16:20-18:25). When Joseph is not at the Hotel, the Hotel's other departmental managers serve as the Manager on Duty and exercise supervisory control over the employees. (*Id.* at 64:3-65:18); *See Ramada Beverly Hills*, 278 NLRB at 692 ("manager on duty program ... militates against a finding that the Employer's operation can be compartmentalized into separate, autonomous units.")

The front desk as the "nerve center" further establishes the highly integrated nature of the Hotel. (Ex. 6, 26:5-9); *Ramada Beverly Hills*, 278 NLRB at 692 (front desk as the "hub" shows the integrated nature of the employer's operation); *Golden Eagle Motor Inn*, 246 NLRB 323 (1979) (other employee contact with the front desk supports a single unit). The front desk is the main point of contact for all guest questions and issues. (*See*, Ex. 2, p. 4; Ex. 6, 29:7-21). If a guest has an issue or complaint, the front desk handles the complaint. (Ex. 7, 29:7-30:1).

Multiple times throughout a day, when guests need an amenity, the guest calls the front desk. (Ex. 6, 126:22-127:19; 141:14-21). An Agent then radios the Houseperson to have the amenity delivered. (*Id.* at 127:12-16; 147:1-4). Notably, RAs also utilize Agents to communicate with other Housekeeping employees. (*Id.*) RAs that needs additional supplies while cleaning a guest room call an Agent who radios the Houseperson to deliver the item. (Ex. 7, 26:9-20). The Agents and Housepersons are among the only hourly employees who regularly carry radios so that they can remain in close communication. (*Id.* 100:24-101:2; 127:12-16; Ex. 7, 26:9-27:5).

The front desk works in tandem with Housekeeping, assigning and cleaning guest rooms. Each day, the Night Auditor starts the Rooms Exception Report that Housekeeping utilizes to assign what rooms the RAs clean. (Ex. 7, 63:11-65:6). As RAs clean the rooms, they call the front desk or punch in a code letting Agents know that the room is clean and available for another guest. (Ex. 6, 100:10-23). Housekeeping delivers the Rooms Exception Report along with an accounting of status of each room at the Hotel, to the Front Desk at the end of Housekeeping's shift. (*Id.* at 171:8-173:22). Agents also communicate directly with Housekeeping if there are questions regarding the status or availability of rooms. (*Id.* at 142:11-143:10).

Agents and Housekeeping also communicate prior to a guest's arrival to ensure each room has the proper items. If a guest has a request prior to check-in, an Agent inputs a special code into the computer (i.e. a guest would like feather free or foam pillow). (*Id.* at 140:3-24). That code then generates a report showing RAs what the guest would like in the room when they arrive. (*Id.*)

In addition to starting the Rooms Exception Report, the Night Auditor, along with a security guard, are the only employees at the Hotel after 10:30 p.m. (*Id.* at 164:14-165:4). Therefore, the Night Auditor handles all guest requests. (*Id.*) If a room needs cleaned, a guest needs an amenity, a guest would like help moving rooms, or a guest has a request for Housekeeping in

the morning, the Night Auditor handles the request. (*Id.*)

Functional integration also exists with the F&B Division. F&B employees rely on LAs to provide the restaurant and banquet functions with linens. (Ex. 6, 41:9-42:2). Multiple times each day, F&B employees bring dirty linen to the LAs who clean the linen. (*Id.*; Ex. 7 at 37:7-20). An F&B employee then retrieves the clean linen. (*Id.*)

Room service is integrated with Housekeeping and the Front Office. Room Service Servers take trays of food to guest rooms. RAs then remove the trays from the guest room, placing it in the hallway, and the Room Service Server retrieves the trays. (Ex. 7, 19:1-8). Room Service Servers also rely on the Front Desk to answer room service orders. Since there is only one Room Service Server working at a time, that employee cannot always answer the phone. (Ex. 6, 130:2-16; Ex. 3, 3). On occasions where the Room Service Server cannot answer the phone, an Agent answers the call and takes the order. (Ex. 6, 130:2-16. The Agent then either relays the order to the Room Service Server or puts the order into the computer. (*Id.*) Finally, some guests of the Hotel receive special amenities such as a fruit basket or chocolate covered strawberries for their birthday or other special occasions. (*Id.* at 149:21-150:21). The Front Desk contacts the Room Service Server to coordinate delivery of the item, and provide the Room Service Server with a room key. (Ex. 6, 149:14-150:21; 170:16-18).

Banquets are functionally integrated with Housekeeping. During banquet events, Housepersons clean and refresh bathrooms. (Ex. 7, 24:1-24). Depending on the size and length of the event, the refreshing of the bathroom can happen multiple times during an event. (*Id.*) Banquets are also integrated with the Front Office. The Hotel schedules additional Bellstaff to park banquet attendees' cars. (Ex. 6, 79:2-13; Ex. 7, 24:1-24). Banquet attendees then pay Agents for the valet service. (Ex. 6, 79:19-25). Banquet attendees also can require rooms, which directly increases the

workload of the Agents, Bellstaff, RAs, and Housepersons. (*Id.* at 80:1-17).

Beyond these examples, many other responsibilities of the Employer also are functionally integrated between excluded and included job classifications. Specifically:

- 100% of room service revenue is attributable to Hotel guests; (Ex. 7, at 27:6-14)
- 95% of the restaurant's revenue is attributable to guests staying the Hotel; (*Id.*)
- Room Service Servers work with the Front Desk with a guest's bill; (Ex. 6, at 170:3-15)
- The Night Auditor closes out guest accounts for F&B charges; (*Id.* at 192:17-193:2)
- Daily, Bellstaff and Agents deliver amenities to rooms; (Ex. 6, at 127:21-128:1)
- Guests arriving for banquet events are directed by the Front Office; (Ex. 7, at 24:1-10)
- To credit to a guest account, Servers must work with the front desk; (*Id.* at 48:1-12)
- Guest will contact Agents during events, who will contact banquets; and (*Id.*, at 24:11-18)
- Hotel-wide scheduling is based upon Hotel occupancy. (Ex. 4, p. 6).

Based on the highly integrated nature of this Hotel, the only appropriate unit includes all of the Hotel's Rooms Division and F&B employees.

c) Employees Have Frequent Contact and Overlapping Job Duties

The frequent contact and overlap between included and excluded employees shows that the only appropriate unit consists of all Rooms Division and all F&B employees. *Ramada Beverly Hills*, 78 NLRB at 692 (overlap and frequent contact found by employees working throughout the hotel and assisting other employees); *Golden Eagle Motor Inn*, 246 NLRB at 323 (frequent contact with the front desk to get change or to see the general manager whose office was behind the front desk); *Atlanta Hilton & Towers*, 273 NLRB 87, 91 (1984) (contact as part of job related tasks). In fact, the RD's own analysis establishes "that there is regular daily contact among employees in the departments at issue." (Ex. 4, p. 6).

As described above, Front Desk employees have frequent and constant contact throughout the day with Housepersons and RAs. The Front Office's duties also overlap with Housekeeping. Agents assist Housekeeping employees with stripping beds and taking amenities to guest rooms. (Ex. 6, 178:25-179:15). Bellstaff also delivers amenities. (Ex. 6, 151:6-14). Evenings, after the

Houseperson leaves, an Agent or Bellstaff is responsible for delivering amenities. (Ex. 6, 124:21-128:1). Further, the Night Auditor performs all of the Housekeeping functions when necessary as the only employee at the Hotel. (*Id.*)

F&B employees have frequent contact with the Front Office. Room Service Servers contact Agents to coordinate the delivery of a food amenity and retrieve a room key. (Ex. 6, 149:14-150:21; 170:16-18). Room Service Servers also contact Agents for issues related to a guest's account when the guest is attempting to charge food to their room. (Ex. 6, 170:3-15). Agents and Room Service Servers have overlapping duties and frequent contact when Agents take room service orders. (Ex. 6, 130:2-16). Bellstaff and Room Service Servers also work throughout the Hotel. *Ramada Beverly Hills*, 78 NLRB at 692 (employees that work throughout the hotel have frequent contact with other employees).

Housepersons have frequent contact and overlapping job duties with employees throughout the Hotel. *See Servico, Inc.*, 214 NLRB 651 (1974) (housekeeping employees cleaning other departments supports a single unit). Housepersons and Bellstaff have overlapping duties because they both clean the porte-cochere. (Ex. 6, 125:2-9). Housepersons are in contact and assist F&B employees by maintaining the cleanliness of banquet, restaurant, and concierge lounge areas. (*Id.* at 32:9-14; 34:5-15; 46:16-47:22). Further, Housepersons also clean the Front Desk area. (*Id.* at 23:4-13). Finally, LAs have multiple interactions daily with all F&B employees when dropping-off and picking-up linen. (*Id.* at 41:9-42:2).

The following further evidences the frequent contact or overlapping job duties exhibited by the included and excluded employees:

- The General Manager's office is behind the Front Desk (*Id.* at 135:22-25; *See Golden Eagle Motor Inn*, 246 NLRB at 323);
- All employees utilize the same cafeteria, time clock, locker rooms, entrance, parking lot, and eat the same Employer provided meals; (Ex. 4, p. 6)

- The Night Auditor closes out F&B accounts at the end of the night; (Ex. 6, 192:17-193:2)
- Agents radio Housepersons to empty trash at the front desk; (*Id.* at 145:915)
- Agents, Night Auditors, Room Service Servers, and Restaurant Servers deposit cash received from guests in the same safe located behind the front desk; (*Id.* at 136:4-138:7)
- Kitchen employees provide employees food in the Hotel's cafeteria; (*Id.* at 90:12-92:17)
- Kitchen employees clean the employee cafeteria; (*Id.* at 90:12-92:17)
- Two Agents regularly work as banquet servers; (*Id.* at 76:10-77:11)
- Cooks, Dishwashers, Housepersons, RAs, and Bellstaff all clean portions of the Hotel;
- Servers and banquet staff comes to the front desk area to make copies. (*Id.* at 137:7-17);
- In order to issues a credit to a guest account, Servers must request the credit by the front desk. (Ex. 7, 8:1-12).

The frequent contact amongst included and excluded employees further supports that the petitioned-for units are not sufficiently distinct and are inappropriate.

d) *The Housekeeping Petitioned-For Unit is Not Sufficiently Distinct*

In order to constitute an appropriate unit, the interests of the Housekeeping employees must be *sufficiently distinct* from the excluded employees. *PCC Structurals*, 365 NLRB No. 106. In doing so, the Board weighs whether “excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.” *PCC Structurals*, 365 NLRB at 13 (quoting *Constellation Brands U.S. Operations*, 842 F.3d at 794). The RD’s determination that the petitioned-for Housekeeping is sufficiently distinct from the Hotel’s excluded employees is erroneous.

In addition to the above-shared community of interest with excluded Hotel employees, Housekeeping employees do not constitute a separate administrative grouping. Housekeeping, along with the Front Office, constitute the Hotel’s Rooms Division. (Ex. 7, 53:20-54:6). The community of interest test focuses on the employer’s chosen structure of its workplace. *The Neiman Marcus Group, Inc.*, 361 NLRB No. 11, slip op. 4 (2014). The uncontroverted testimony is that the Hotel groups its employees by the two divisions – Rooms and F&B. (*Id.*) Thus, Housekeeping employees do not share a distinct administrative grouping from the Hotel’s Front

Office employees and that factor weighs against the petitioned-for unit.

Further, it is axiomatic that if the petitioned-for unit does not have certain shared interests, those interests cannot be weighed in favor of finding the petitioned-for unit as sufficiently distinct. Housekeeping employees do not perform distinct work or have distinct job functions. Housepersons have shared facility-cleaning responsibilities with Bellstaff, Room Service Servers, and kitchen employees. The RD's determination that the manual nature of Housekeeping work distinguishes those employees from others is further error. There is little dispute that Bellstaff carrying luggage and cleaning is comparable manual labor. Additionally, little separates the type of cleaning done by LAs and Dishwashers. Both utilize a machine that cleans items and then each sorts the items. Finally, aside from cleaning, there is no common thread that links the jobs of Housekeeping employees that makes them distinct from the Hotel's other employees. RAs, LAs, and Houseperson perform jobs unique to their classification and using unique tools. There are no special hiring requirements and each has its own job specific training. (Ex. 7, 36:2-19; Exs. 2, 3, p. 12). Thus, on balance, the similarities of Housekeeping employees are not sufficiently distinct to outweigh the similarities with excluded employees.

e) The Petitioned-For F&B Unit is Not Sufficiently Distinct

The RD's determination that the petitioned-for F&B unit is sufficiently distinct from the Hotel's excluded employees is erroneous. In addition to the above-described community of interest, employees in the F&B Division do not have shared interests separate from excluded employees because they have distinct supervision, different schedules, and different job functions. The RD found that Gordana Malekic was the F&B Manager, and that all employees reported to her. This is not true. Malekic is the restaurant supervisor; Manuel Garcia is the kitchen supervisor and Santana Hernandez supervises the banquet staff. (Ex. 8, 192:13-19, U. Hearing Ex. 8). Kitchen

employees are train by Garcia and the Front Office Manager trains the Servers. (Ex. 7, 66:4-9). Each grouping makes its own schedule. (Ex. 6, 111:16-112:8; Ex. 8, 28:25-29:22). The banquet schedule appears with the restaurant schedule but the kitchen has its own schedule posted in a separate location. (Ex. 6, 111:16-112:8, E. Hearing Ex. 7). Further, job duties of the kitchen staff are distinct from the job duties of banquet servers and restaurant servers. Thus, on balance, the similarities of F&B employees are not sufficiently distinct to outweigh the similarities with excluded employees.

3. Conclusion

The record is replete with examples of the Employer satisfying its burden of establishing that the petitioned-for units do not share a community of interest sufficiently distinct from the excluded employees and that any unit short of all Rooms Division and F&B Division employees of the Employer would not be appropriate. The employees indisputably are functionally integrated, have overlapping job duties, frequent contact, and common terms and conditions of employment. Since the excluded employees share a community of interest with the petitioned-for employees and the petitioned-for units are fractured, the only appropriate unit must include all job classifications in the Rooms Division and F&B Division. Based on the foregoing, compelling reasons exist for the Board to grant this Request for Review because the RD's community-of-interest finding is clearly erroneous and prejudicially affects the Employer's rights.

B. A Substantial Question Concerning the Legality of the Housekeeping Unit is Raised by the Direction of Elections Because of the RD's Departure from the Board's Precedent and Clearly Erroneous Factual Determinations that Have Prejudiced the Hotel.

Assuming, *arguendo*, that an appropriate unit exists smaller than a combined unit of all Rooms Division and F&B Division employees, the RD's approval of the petitioned-for unit of half of the Rooms Division is clearly erroneous and must be overturned. The community of interest

test focuses on the employer's chosen structure of its workplace. *The Neiman Marcus Group, Inc.*, 361 NLRB No. 11, slip op. 4 (2014). The Board has "always assumed it obvious that the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has direct bearing on the community of interest among various groups of employees in the plant and thus an important consideration in any unit determination." *Id.*

Even though the Hotel is organized in two distinct divisions – Rooms and F&B – the RD inappropriately approved a fractured unit of the Hotel's Rooms Division. (Ex. 7, 53:20-54:6). As set forth in detail above, a significant community of interest exists between the Front Office and Housekeeping employees. In addition to identical terms and conditions of employment, functional integration, daily contact, and overlapping job duties, these two departments are an administrative grouping that further supports that the excluded Front Office employees must be included with the petitioned-for unit of Housekeeping employees.

The fact that the Front Office could seek representation is irrelevant. As the Board explained in *PCC Structural*s:

Further, the possibility that excluded employees may seek separate representation in one or more separate bargaining units does not solve the problem caused by the failure to give reasonable consideration to their inclusion in a larger unit. The Act's requirement that the Board "assure to employees the fullest freedom" in exercising protected rights requires the Board "in each case" to consider the interests of *all* employees-- whether or not they are included in the petitioned-for unit--so the Board can "decide" whether the unit should be the "employer unit, craft unit, plant unit, or subdivision thereof." NLRA Sec. 9(b).

365 NLRB at 10, fn. 42. By excluding the Front Office from the petitioned-for unit, the RD has denied the Front Office its fullest freedom and rights under the Act.

Based on the foregoing, compelling reasons exist for the Board to grant this Request for Review because the RD's community-of-interest finding is clearly erroneous and prejudicially affects the Employer's rights.

C. **The Direction of Elections Raise a Substantial Question Concerning the Legality of the Unit Based on the RD's Departure from the Board's Precedent on Hospitality-Industry Unit Determinations.**

The RD departed from precedent regarding bargaining units in the hospitality industry. Within this industry, the Board makes case-by-case unit determinations utilizing the traditional community-of-interest factors. Often, especially in cases involving functionally integrated hotels and motels where employees have frequent contact, as is the case here, the Board found that only a “wall-to-wall” unit is appropriate. *See, e.g., Servico Inc.*, 214 NLRB at 652 (finding a single unit appropriate because of the “functional relationship of employees included in the unit with those excluded, the common working conditions, and frequent contact inherent in such a facility”); *Holiday Inn-Atlanta Northwest*, 214 NLRB at 931 (including front desk clerks in unit because of a strong community of interest with other hotel employees); *Golden Eagle Motor Inn*, 246 NLRB 323 (a single unit was appropriate based on the “high degree of overlap of job functions”); *Atlanta Hilton*, 273 NLRB 87 (finding single unit appropriate because the Hotel “is a highly integrated operation” and “[e]mployees in different departments frequently have contact with employees in other departments in performing their duties”); *Ramada Beverly Hills*, 278 NLRB at 692 (reversing RD and finding single unit appropriate due to the “high degree of functional integration and centralized policymaking [that was] reflected in the substantial overlap of employee job functions and frequent employee contact.”); *Westin Hotel*, 277 NLRB 1506.

The Board opines, “there is no requirement that all employees perform identical tasks in order to be grouped together in the same unit.” *Westin Hotel*, 277 NLRB at 1508. Rather, “[i]t is sufficient that the . . . employees perform . . . the similar integrated function of ensuring that the hotel’s physical plant is properly maintained.” *Id.* In that way, a single unit is appropriate when “although each employee group has a primary function, the employees in those groups assist each other, work in close and repeated contact, and generally act towards the common goal of providing

guest and patron services.” *Ramada Beverly Hills*, 278 NLRB at 693. Indeed, the Board has specifically disapproved of attempts to “carve out individual units without regard to the extensive functional integration” at the facility. *Id.*

Like in *Wheeling Island Gaming*, in hospitality cases, the Board relies on the fact that employees frequently share “comparable wages, identical benefits, and other significant terms and conditions of employment” such as “uniform personnel policies regarding recruitment, hiring, orientation, and work rules” in determining that a single unit is appropriate. *Westin Hotel*, 277 NLRB at 1508; *see also Golden Eagle*, 246 NLRB at 323 (same); *Atlanta Hilton*, 273 NLRB at 88 (same); *Holiday-Inn Atlanta*, 214 NLRB 930, 930-31 (1974) (same); *Servico*, 214 NLRB at 652 (same); *Ramada Beverly Hills*, 278 NLRB at 692 (same). “These common links . . . are [the] factors utilized in determining whether a group of employees would be adequately represented within an overall unit.” *Westin Hotel*, 277 NLRB at 1508, n. 9.

The Board’s decision in *Ramada Beverly Hills*, 278 NLRB 691, is particularly instructive. In that case, the union filed two petitions – one seeking to represent the housekeeping and maintenance employees and one seeking to represent the F&B employees. Like here, the union sought to exclude the front office. Also like here, the employer contended that the only appropriate unit was a single unit including the front office employees. The Board agreed, finding:

The Employer, like most hotel operations, runs a functionally integrated enterprise whose purpose is to provide lodging, dining, and related services to its guests and patrons. Thus, while the employees perform a variety of duties, their common objective is to provide a highly integrated group of services, directly and indirectly, for the hotel's guests. We have already detailed the common pay rates and fringe benefits that all the Employer's employees share as well as the centralized control of the day-to-day operations and the centralized formation of personnel practices. Thus, the general manager effectively runs the operation. He is the ultimate authority on personnel decisions and, as reflected in the grievance procedure, is the final in-house interpreter of management's personnel policies. ... The collegial nature of the executive board, as reflected by the manager on duty program, also militates against a finding that the Employer's operation can be compartmentalized

into separate, autonomous units.

Id. at 692. The Board further considered that the housekeeping employees clean the lobby, front desk, and restaurant areas in addition to guest rooms; that the room attendants had frequent and daily contact with the front desk regarding occupancy; both front desk and housekeeping employees utilize a housekeeping report; and laundry employees interacted with F&B employees regarding linen on a daily basis. *Id.*

Here, as described above, the Hotel runs a functionally integrated operation to provide lodging, dining and related services to Hotel guests. All employees have the same terms and conditions of employment in that they all have the same employee orientation, handbook, fringe benefits, vacation, time clock procedures, locker rooms, cafeteria, parking lot, name tags, and sick time. All employees are scheduled based on Hotel occupancy and events, are paid on an hourly basis, and receive bi-weekly paychecks. Finally, the Hotel has a centralized personnel department that handles recruitment training, recordkeeping and the administration of personnel policies.

Further, Joseph oversees all operations at the Hotel; implements and approves all Hotel policies; interviews and has final say over the hiring of all “guest-facing” employees; and approves all departmental schedules. While at the Hotel, Joseph serves as the Manager on Duty and has final say on all employee and guest related decisions. He also supervises and interacts with all employees on a daily basis. When Joseph is not at the Hotel, the Hotel’s other department managers serve as the Manager on Duty and exercise supervisory control over all of the Hotel’s employees.

In further similarity to *Ramada Beverly Hills*, Housekeeping employees clean the lobby, front desk, and restaurant areas in addition to guest rooms. Agents are in regular contact with RAs regarding room occupancy. Each morning the Night Auditor provides Housekeeping the Rooms Exception Report showing what rooms are occupied. Based on this report, RAs are assigned rooms to clean. Once the room is cleaned, RAs inform the front desk and the room will be assigned to a

guest. Further, the Agents are in regular contact with Housepersons based on guest and RAs requests. If a guest or RA has a request or needs an item, an Agent handles the request then radios a Houseperson to fulfill that request. Finally, F&B employees regularly interact with laundry employees by working together daily to provide the essential linens for the Hotel's restaurant and banquet operations.

Therefore, the Board should grant the instant Request for Review because the RD significantly departed from the Board's hospitality-unit determination precedent and thereby raising a substantial question of law and fact regarding the appropriateness of the units ordered in these proceedings.

D. The RD's Departure from Board Precedent that the Union's Petitions Were Not Barred By the Petition Bar Doctrine in the Direction of Elections Raise a Substantial Question Concerning the Legality of the Unit.

The RD misapplied established Board law and committed prejudicial error by not dismissing the petitions filed by the Union because the petitions were filed within six-months after the Union withdrew its petition to represent the same group of the Hotel's employees. Unless good cause is shown, a union that withdraws its petition after a hearing, is not permitted to file a petition *to represent the same employees* for a period of six months after its withdrawal. *Sears, Roebuck & Co.*, 107 NLRB 716 (1954) (emphasis added). The purpose behind the six-month prejudice period is to conserve Agency resources and discourage duplicate filings. *See NLRB Casehandling Manual (Part Two) Representation Proceedings*, Sec. 11118.

On March 2, the Union filed a petition seeking to represent the Hotel's Housekeeping and F&B employees. On March 29, the Region dismissed the petition because the Union attempted to gerrymander a unit that was incompatible with the traditional community of interest analysis as set forth in *PCC Structurals*.

On March 30, one day later, the Union filed the petitions in the instant matter seeking to

represent the exact same employees. However, by virtue of the prior dismissal, the Union was barred for six-months from seeking to represent the same group of the Hotel's Housekeeping and F&B employees and the petitions here must be dismissed. This the exact conservation of resources the NLRB's six-month bar to refiling a petition that Section 11118 of the Casehandling Manual was designed to protect. Specifically, the Union filed an unlawful petition, the Region expended resources and conducted a daylong hearing, prepared a decision, and appropriately dismissed the petition. Setting aside that the petitioned-for units are unlawful, the Board's rules do not permit the Union to file a petition the next day to represent the same employees that the Region just dismissed. There can be no clearer case of suppression of NLRB resource than processing petitions for the same unit that was dismissed a day earlier.

Further, the Union cannot be permitted to sidestep the determination that a unit of the Hotel's Housekeeping and F&B employees was inappropriate by filing two separate petitions a day later and proceeding together as the same single unit. While there may now be two petitioned-for units, the separate units exist only on paper. The Petitioner's actions make this abundantly clear. The Union sought elections for both units on the same day, in the same room, using the same process, same eligibility period, and election times. Moreover, the Union's actions during the campaign were consistent with a single petitioned-for unit. Employees from F&B and Housekeeping are represented by the same Union, participated in and traveled together to the same Union meetings, appeared on the same campaign propaganda, voted in the same election at the same time, appeared together in the same pro-union propaganda, and celebrated a victory together on the same day together.

The Regional also did nothing to suggest this was not a single unit. The Region combined the pre-election hearing on the two petitions *sua sponte*. (See, Exs. 2, 3). The record and testimony

from the dismissed single petition was made part of the pre-election record in the instant matter. (*Id.* at fn. 3). The Decision and Direction of Elections for both petitions were substantially similar and copied the same language. (*See*, Exs. 2, 3). The RD ordered an election at the same location, in the same room, at the same time, and using the same eligibility period. (*Id.*) The hearing on post-election challenges was also combined *sua sponte*. (Ex. 5, p. 2). The Hearing Officer issued a combined Report on Objections for both petitions. (*See*, Ex. 5). Simply put, there is nothing to suggest that these are two separate units exist anywhere but as case numbers on a petition. And there is no dispute that the separate filings were anything more than the Union's attempt to circumvent the RD's initial ruling that a unit of Housekeeping and F&B employees was inappropriate. In so doing, and as discussed more fully in section B above, the RD has denied Front Office employees the protections of the Act, and returned to the *Specialty Healthcare* standard where the petitioned for unit is controlling. *PCC Structural*s, 365 NLRB at *7.

Here, the Union's actions are superficial and designed to evade the proper legal analysis and determination made by the RD regarding the initial petition. The RD's Decision not to bar the identical petitions raises substantial questions of law and by departing from established Board processes, the Employer and the Employers were both prejudiced. Thus, the Board should grant the Request for Review.

E. The Supervisory Determinations Raise Substantial Questions Of Law Based on the RD's Departure from Board Precedent and Clearly Erroneous Factual Determinations.

The RD created a substantial question of law or policy by departing from Board precedent and made clearly erroneous factual finding prejudicing the Hotel in finding that the Housekeeping Supervisor Edilvia Bucio and Banquet Captain Santana Hernandez were not supervisors under the Act. The RD adopted the Hearing Officer's Report that Bucio and Hernandez were not statutory supervisors because their duties were "routine and administrative in nature" and they did not have

the authority to effectively recommend discipline. The RD's determinations are factually unsupported, contrary to established Board precedent, and must be overturned.

1. Definition of a Supervisor

Section 2(11) of the National Labor Relations Act (the "Act") defines "supervisor" as any individual having the authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, so long as such authority is not routine or clerical in nature, requiring independent judgment. 29 U.S.C. § 152(11). An individual need only possess *one* of these indicia of supervisory authority as long as the exercise of such authority is carried out in the interest of the employer, and requires the use of independent judgment. *Mountaineer Park*, 343 NLRB 1473, 1474 (2004); *Bryant Health Ctr., Inc.* 353 NLRB 739, 742 (2009) (The powers specified in Section 2(11) are *disjunctive*, thus, "[a]n individual need possess only one of the enumerated indicia of authority in order to be encompassed by Section 2(11).") (emphasis added).

2. Bucio Is a Statutory Supervisor

The RD's determination that Bucio is not a supervisor is contrary to established Board precedent and factually erroneous. The characterization of Bucio's job duties and job title underscores the fundamental flaws in the RD's analysis.

The RD adopted the Hearing Officers specious characterization of Bucio as having only "some" of the duties of the Housekeeping Manager when she worked weekends. (Ex. 1; *See also*, Ex. 5 4, 9). The credible evidence establishes that when working as the Housekeeping Manager twice a week, Bucio has *all* of the duties and responsibilities as the weekday Housekeeping Manager. (*Id.* at 23:11-26:1).

The RD's finding that Bucio is the "room inspector" is also an error. (Ex. 1). Bucio is

widely known to employees as the Housekeeping Supervisor, the #2 person in the department, and person in charge two days per week. (Ex. 8, 23:12-20; 121:16-22). Even the Union recognizes Bucio as the Housekeeping Supervisor, by featuring her picture on a flyer with her name and title of “Housekeeping Supervisor” during the campaign. (*Id.* at 27:4-25, E. Hearing Ex. 2). The misnomer and mischaracterization are errors that reflect a broader mishandling of the issues surrounding Bucio and her coercive tainting impact on the voting process.

Simply put, when Rodriguez is not around, Bucio is well-known as the management authority for all issues arising in, and concerning Housekeeping Department employees. (*See e.g.* Ex. 8, at 23:11-26:1; 53:21-24; 105:16-106:1). Thus, to the extent the Housekeeping Manager is excluded from the unit as statutory supervisor/manager, Bucio, as the Housekeeping Manager must also be excluded. *See, Aladdin Hotel*, 270 NLRB 838, 840 (1984).

a) Bucio Assigns Employees in the Housekeeping Department

When a person assigns employees to a particular post, location, or overall task, such as Bucio does at least twice per week, that person is a supervisor under the Act. *Oakwood Healthcare*, 348 NLRB 686, 689 (2006). Acting as the Housekeeping Manager, Bucio assigns each RA what rooms they will clean for that day. (Ex. 8, 24:3-24). Every morning Bucio must analyze what rooms need to be cleaned, whether the rooms are a checkout or stayover, the type of room (single or double), the RAs preferred section, and the floors the rooms are on and then assigns the work to the Room Attendants. (*Id.* at 17:19-20:13; 39:6-19). Each day an RA will have a different workload and the workloads vary by Room Attendant based on the number of beds in a room, stayovers, checkouts, and DNDs. (*Id.* at 39:14-19; 108:16-110:14).

Bucio is required to adjust and balance assignments throughout the day. (*Id.* at 110:12-14). For example, a typical day may require Bucio to add rooms to an RA’s workload based on call outs, sickness, changes in Hotel occupancy, or too many DNDs for a given RA. (*Id.* at 21:9-22:3;

108:16-110:14). There is no policy dictating how to balance the workloads and it is at Bucio's discretion to make the adjustments when acting as the manager. (*Id.* at 110:9-12). Bucio analyzes and creates assignments daily based on the needs of the Hotel. Each day the Hotel's operation is different, with different needs and different requirements, and Bucio must assign work accordingly.

The RD's decision is based upon the irrelevant case citations and incorrect factual analysis of the Hearing Officer that Bucio is not a supervisor because she merely equalized the workload among RAs. (*See*, Exs. 1, 9). The RD's conclusion that Bucio "merely" equalized the workload fails to account for the differing workloads among the RAs on a given day. The Hotel's needs are fluid and change daily. (Ex. 8, 39:14-19; 108:16-110:14). Every morning Bucio analyzes what rooms needed to be cleaned, whether the rooms were a checkout or stayover, the type of room (king or double), the RAs preferred section, and the number of floors the rooms are on and then assigns the work to the RAs. (*Id.* at 17:19-20:13; 39:6-19). Each day an RA will have a different workload and the workloads vary by RA based on the number of beds in a room, stayovers, checkouts, and DNDs. (*Id.* at 39:14-19; 108:16-110:14).

The RD's adopted reliance on *Oakwood Healthcare* is misplaced. (Ex. 5, p. 9). 348 NLRB 686, 693 (2006). In *Oakwood*, the Board found that "if the assignment is made *solely* on the basis of equalizing workloads," it lacks independent judgment. *Id.* (emphasis added). That is clearly not the case here. As the Housekeeping Manager, Bucio assigns each Room Attendant what rooms they will clean for that day based on the type of room, workload, preferred section and type of cleaning the room needs. (Ex. 8, 24:3-24). This is not equalization of work, but a direct assignment to the rooms that each person will clean based upon her analysis of the Hotel's daily needs. *See Micro Pacific Development, Inc. v. N.L.R.B.*, 178 F.3d 1325, 1331-32 (D.C. Cir. 1999 (assigning

housekeeping work based on hotel needs confers supervisory status); *Eskaton Sunrise Community*, 279 NLRB 68, 75 (1986) (assigning housekeeping duties and checking room attendant work confers supervisory status).

The other precedent relied upon by the Hearing Officer is similarly unpersuasive. In *Springfield Terrace LTD*, 355 NLRB 937, 943 (2010), the Board held assignments based on availability and not the needs of the facility do not confer supervisory status. Here, availability is not a factor considered by Bucio. Bucio assigns the Room Attendants rooms daily and is free to adjust work and make employees available as necessary throughout the day to meet the needs of the Hotel. Finally, the Hearing Officer cited *Children's Farm Home*, 324 NLRB 61 (1997), for the proposition that when assignments are based on the express preferences of the employees, independent judgment does not exist. However, in that case, assignments were based upon expressed preference and *consensus* of the employees. Here, no such employee discretion is permitted or exercised.

Rather, when a person assigns employees to a particular post, location, or overall task, such as Bucio does at least twice per week, that person is a supervisor under the Act. *Oakwood Healthcare*, 348 NLRB at 689; *Micro Pacific Development, Inc.*, 178 F.3d at 1331. Therefore, Bucio assigns employees work as defined in Section 2(11) of the Act and is a statutory supervisor.

b) Bucio Responsibly Directs the Housekeeping Department

The RD committed further error in finding that Bucio did not responsibly direct employees. (Ex. 1). In fact, the RD relied upon the Hearing Officer's Report that was completely devoid of any direct analysis on the issue. (*See*, Ex. 5). As the Board reiterated in *Oakwood Healthcare*, the terms "'assign' and 'responsibly to direct'" are not synonymous and must be accorded separate meaning. 348 NLRB 688-689. In any event, Bucio has the authority to responsibly direct the Housekeeping Department. The RD's finding is contrary to established precedent and factually

erroneous. The finding must be rejected.

“If a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible’ ... and carried out with independent judgment.” *Oakwood Healthcare*, 348 NLRB at 692. This is precisely the role that Bucio performs. For example, this could mean to clean a different room, clean an additional room, or clean a checkout instead of stayover or DND. (Ex. 8, 39:14-19; 108:16-110:14). She must use her own judgement to take into account the workload of the employees and who is capable of performing the task. (*Id.* at 110:9-12). And though she can mandate an employee correct deficient work, it is Bucio as the Supervisor who faces adverse consequences if the work is not completed. (*Id.* at 20:14-21:8; 22:22-23:6; 24:3-18). Based on the forgoing, Bucio is a statutory supervisor within the definition of the Act, and must be excluded from the employee unit.

c) *Bucio Has the Authority to Discipline Employees*

The RD, relying on the Hearing Officer’s decision, further committed prejudicial error in finding that Bucio was not a supervisor because she could not effectively recommend discipline. (Ex. 1; Ex. 5, p. 10). An employee only needs the authority to discipline or effectively recommend discipline to be a supervisor. *Mountaineer Park*, 343 NLRB 1473, 1474 (2006). Both Rodriguez and Joseph testified that Bucio does in fact have the power to recommend discipline. (Ex. 8, 23:11-26:1; 53:21-24; 111:7-15). Moreover, the fact that Bucio has access to other managers to ensure she handles discipline properly does not undercut her supervisory status. It is required review or independent investigation by another party that undercuts the independent judgment of supervisory status. *Id.* at 1474-76. Rather, the evidence here is that Bucio has the authority, as the Housekeeping Manager to issue or effectively recommend discipline.

The RD also erred in finding that Bucio did not actually recommend discipline. Bucio not

only had the authority to recommend discipline, but the evidence establishes that she did recommend discipline. The adopted erroneous conclusion failed to consider that there has been almost no discipline in the Housekeeping Department over the last year. (*See*, Ex. 5, p. 10). In fact, the only incident of discipline that any witness could recall in the past year involved Bucio recommending discipline to Rodriguez. Specifically, Bucio informed Rodriguez that a Room Attendant had too many attendance violations and Rodriguez administered the discipline. (Ex. 8, 110:15-111:17). The fact that higher management might review the discipline means nothing. (*Id.* at 111:7-15). If management signs off on the discipline without conducting an independent investigation, even if the discipline is reviewed, the person recommending the action has the authority to issue discipline. *Mountaineer Park*, 343 NLRB at 1474-76. Here, the credible testimony is that Bucio informed Rodriguez of the issue and Rodriguez took action without independent investigation. (Ex. 8, 111:3-15).⁷

Based on all of above, compelling reasons exist for the Board to grant this Request for Review because the RD's Section 2(11) determination regarding Bucio is clearly erroneous and prejudicially affects the Employer's rights.

3. Hernandez is a Statutory Supervisor

Like Bucio, the RD's determination that Hernandez is not a supervisor is contrary to established Board precedent and factually erroneous. Hernandez is the head of the banquet

⁷ The Board relies on so-called "secondary indicia" of supervisory status where such indicia "corroborate" a Section 2(11) determination. *Sheraton Universal Hotel*, 350 NLRB 1114 (2007). Secondary indicia includes: higher rate of pay, signing documents only supervisors are required to sign, and being held out as a supervisor. *Id.* Here, the Officer erred by failing to properly consider the secondary indicia of supervisory status exhibited by Bucio. (Ex. 5, p. 10). Specifically, the Officer failed to recognize that Bucio is not only paid several dollars more than any Room Attendant or Housekeeping Department employee, but she also signs documents that only supervisors sign (i.e., the Rooms Exception report), edits time punches, and as described above, is held out as a supervisor to other employees. (Ex. 8, 23:13-24; E. Hearing Ex. 2; 41:25-42:14; E. Ex. 5; 120:18-121:22; 146:12-17). All of these functions are withheld from any other employee in the department, regarding several privileges and responsibilities and reserved only for Bucio in her role as supervisor, and the department's manager, Rodriguez.

department and is responsible for assigning work and directing the banqueting operation. (Ex. 8, at 28:25-29:22). As such he is a statutory supervisor.

a) *Hernandez Assigns Work*

As described above, when a person assigns an employee to a particular post, shift, location, or overall task, that person is a supervisor. *See Oakwood Healthcare*, 348 NLRB at 689 (when a person decides for subordinate employees “‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible’ ... and carried out with independent judgment.” *Oakwood Healthcare*, 348 NLRB at 692. This is precisely what Hernandez does. Hernandez selects which employees will cover a banquet event. (Ex. 8, at 29:11-22; 64:16-65:19, E. Hearing Ex. 6). Since there are only two full-time banquet employees (including Hernandez), Hernandez schedules employees from other departments, usually the restaurant or the front desk to cover the event. (Ex. 8, at 57:2-58:3). Not only does Hernandez select which employees will work and what hours they will work, he selects what events they will work. When multiple events are occurring simultaneously, Hernandez assigns which employees will work what event (*Id.* at 65:8-66:1), and during events, Hernandez assigns tasks and directs what each person will do during an event. (*Id.* at 28:25-29:10; 40:8-21; 65:8-66:1).

Another manager’s review of Hernandez’s scheduling decisions does not destroy his 2(11) status in the eyes of the Board. Hernandez admitted that at the time of the hearing the F&B Manager had been in his position less than a month and changed his schedule 50% of the time. (*Id.* at 191:23-192:2). Prior to that, his schedule was not reviewed. (Ex. 8, 192:13-16). Meaning, at most, the F&B Manager would have reviewed four weekly schedules. To destroy Section 2(11) status because an incoming manager oversaw one or two schedules belies logic. The new F&B

Manager was only hired in the last days of what was a four-month representation campaign.⁸ During almost the entire campaign, and prior to the managers arrival, Hernandez prepared the schedule for the entire banquet department with nearly no oversight using his own discretion. (Ex. 8, 51:15-19; 184:12-14). Even if the F&B Manager reviews Hernandez's schedules, such review does not diminish Hernandez's supervisory status. Hernandez was required to utilize employees from other positions within the Hotel – usually other F&B employees. Thus, Hernandez would have the schedule reviewed by the departmental manager to ensure the banquet schedule coincided with the other schedules in the department.

Further, the RD, relied on the Hearing Officer erroneous characterization of banquet events as routine and merely equalizing workload. (Ex. 1; Ex. 5, p. 10). The Hearing Officer found that Joseph testified, “many banquet events are coffee breaks or meetings where snack and food are provided.” (Ex. 5, p. 6). This is incorrect. Rather, Joseph testified that many events *have* coffee breaks or snacks and the service involved for those services is routine in nature. (Ex. 8, 61:14-62:2). There is no support for the Officer's conclusion that these are the only types of events that Hernandez assigned work for or that the existence of a coffee break or snack break constitutes the entirety of the service provided for that event. This shows an improper reading of the record and a fundamental misstatement of the Employer's business.

The Hearing Officer took a similarly narrow view in finding that Hernandez only equalized server workloads during an event. (Ex. 5, p.10). In reaching this conclusion, the Hearing Officer's recommendation ignored all other banquet events, multiple banquet events, and the testimony of the witnesses. While Joseph provided the Officer's conclusion as one *example*, this was not the

⁸ At the time of the hearing on May 23, the F&B Manager was in his position less than a month. (*Id.* at 191:23-192:2). The election in the matter was conducted three weeks earlier on May 2. Thus, according to Hernandez, the F&B Manager was in the position less than a week at the time of the election.

extent of the testimony. Rather, Hernandez selected which employees worked, what hours they worked, and what events they worked. (Ex. 8, 29:11-22; 64:16-66:1; E. Hearing Ex. 6). When multiple events occurred simultaneously, Hernandez assigned which employees worked what event. (Ex. 8, 65:8-66:1). As the Union's own witness testified, "[Hernandez] directs it. He directs me to help him out in any way." (Ex. 8, 208:6-9). He went on to explain that Hernandez directs the banquet staff in every aspect of the event. (Ex. 8, 208:12-17). Further, Hernandez admitted that he directs the banquet staff, is always responsible for telling employees what to do at a banquet event, and that there is "nobody else." (Ex. 8, 186:5-18). Thus, Hernandez assigned work wholly independent of the scheduling as well. Accordingly, he is a supervisor because he assigns work.

b) Hernandez Directs Work

The RD committed further error in finding that Hernandez did not responsibly direct employees. (Ex. 1). Again, the Regional Direct relied upon the Hearing Officer's Report that was completely devoid of any direct analysis on the issue. (*See*, Ex. 5, p. 10). As described above, the terms "assign" and "responsibly to direct" are not synonyms. *Oakwood Healthcare*, 348 NLRB 688-689. Responsibly directs inclusion in Section 2(11) is designed to "ensure that the statutory exemption of Section 2(11) encompassed those individuals who exercise basic supervision." *Id.* at 690. As such, "[i]f a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' that person is a supervisor, provided that the direction is both 'responsible' ... and carried out with independent judgment." *Id.* at 692; *See* also, *Holiday Inn of Perrysburg, Ohio*, 243 NLRB 280 (1979) (lead waitress responsibly directed work and was a statutory supervisor because she assigned employees to banquet stations when they reported and had discretion to change their assignments throughout the day). This is precisely what Hernandez does.

Hernandez decides which employees will work which event, and what work they will

perform when the workers show up to work the event, making adjustments in the staffing and the tasks they perform throughout the workday. (*See e.g.* Ex. 8, at 28:25-29:10; 40:8-21; 41:8-21; 65:8-66:1; 186:5-18; 208:6-9). When a customer has a request or issue during the event, the customer brings it to Hernandez. (*Id.* at 29:23-30:13). Hernandez then has the responsibility of remedying the request or issue and the authority to direct the Banquet staff as he deems appropriate to meet the customer's needs. (*Id.* at 29:23-31:12). It is Hernandez's sole responsibility to ensure the job is completed and he does so free from the influence of others. (*Id.* at 30:14-31:4; 185:5-18 where Hernandez indicates that responsibility to direct the banquet servers lies with "nobody else" but him.) Failure to properly lead the Banquet's team in its delivery of service results in a negative evaluation for Hernandez. (*Id.* at 31:13-15). Further, as described above, the Union's own witness and Hernandez testified that Hernandez responsibly directs the Banquet Department.⁹

Hernandez is statutory supervisor by virtue of his ability to assign work, responsibly direct, and/or authority to discipline, or the ability to effectively recommend such action and he must be excluded from the unit.¹⁰ Thus, compelling reasons exist for the Board to grant this Request for Review because the RD's Section 2(11) determination regarding Hernandez is clearly erroneous and prejudicially affects the Employer's rights.

F. The RD's Decision on Supervisory Taint Raises a Substantial Question Concerning the Validity of the Election and Certification Based on the RD's Departure from the Board's Precedent and Clearly Erroneous Factual Determinations that Have Prejudiced the Hotel.

1. Legal Standard

⁹ Hernandez also has the authority to discipline or effectively recommend disciplinary action. The fact that Hernandez has not issued discipline means nothing. He only needs the authority to discipline or effectively recommend discipline to be a supervisor. *Mountaineer Park*, 343 NLRB at 1474. Since he has the requisite authority, the ability to discipline, or effectively recommend further demonstrates that he is a supervisor under the Act. (Ex. 8, 62:21-63:3).

¹⁰ Hernandez also exhibits "secondary indicia" of supervisory status that corroborate his status as a Section 2(11) supervisor. *Sheraton Universal Hotel*, 350 NLRB 1114. For example, Hernandez is held out as being in charge of the department, receives a higher rate of pay, and presents customers with invoices. (Ex. 8, 28:11-29:10; 41:18-24).

In *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), the Board set forth its standard for setting aside an election because of pro-union supervisory taint. At the outset, the Board noted that while pro-union supervisory conduct is “perhaps less frequent” than anti-union supervisory conduct, “the vice is the same” – that is “employees may be induced to support/oppose the union because they fear future retaliation, or hope for preferential treatment, by the supervisor.” *Harborside*, 343 NLRB at 906-07. As a result, the Board found that in the “interest of conducting free and fair elections” it is incumbent upon the Board to protect employees from supervisor conduct which “interferes with the employees’ freedom of choice” “be it prounion or antiunion.” *Id.* at 907.

Harborside clarified that it is **not** essential that the pro-union supervisory conduct include expressed threats or promises. *Id.* at 909; 913. Rather, in determining whether the pro-union supervisory conduct infringes on free choice, the well-known *Harborside* standard includes: (1) Whether the supervisor’s pro-union conduct reasonably tended to coerce or interfere with the employee’s exercise of free choice in the election; and (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election. *Id.* at 909.

Thus, like other violations of the Act, it is the supervisor’s pro-union conduct, not any objective result of the conduct, which creates a violation.¹¹ *Id.* at 909-910; *SSC Mystic Operating Co., LLC v. N.L.R.B.*, 801 F.3d 302, 309 (D.C. Cir. 2015) (pro-union supervisory conduct is impermissible because it poses a risk of interfering with employee free choice and “the law always forbids a supervisor from trying to influence the free choice of employees”). As simply stated in the NLRB’s *Basic Guide to the National Labor Relations Act*,¹² “[i]n any particular case the NLRB

¹¹ See also, *Harborside*, at 910 fn. 11 (“We believe that the phrase ‘interfere with’ is not synonymous with ‘coercion.’ As in Sec. 8(a)(1), the terms are distinct, and they represent different ways of undermining Sec. 7 rights.”).

¹² Retrieved from <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf>.

does not attempt to determine whether the conduct actually interfered with the employees' expression of free choice, but rather asks whether the conduct tended to do so. If it is reasonable to believe that the conduct would tend to interfere with the free expression of the employees' choice, the election may be set aside." *See also, Taylor Wharton Div. Harsco Corp*, 336 NLRB 157, 158 (2001) ("the proper test for evaluating conduct of a party is an objective one—whether it has 'the tendency to interfere with the employees' freedom of choice'"). Thus, the examination by the Board in this case should be whether the conduct of Supervisors Bucio and Hernandez throughout the course of the Union's campaign had the *tendency* to interfere with the employees' vote, and not whether such interference actually occurred (though examples of such actual interference can be found in the record and are discussed below).

Further, the Board in *SNE Enterprises* recognized the particular danger with pro-union conduct by first-line supervisors. "[T]he first-line supervisor has the most day-to-day contact with the employees. While such a supervisor may not necessarily have the authority to hire, fire, transfer, or promote, his or her authority to assign and responsibly direct can impact broadly on subordinates' daily work lives." *SNE Enterprises*, 348 NLRB 1041, 1043 (2006). Thus, "employees could reasonably fear that responding negatively to the supervisors' pronoun conduct, including the solicitations, would make them more vulnerable" to adverse action by the supervisor.

Madison Square Garden, 350 NLRB 117, 121 (2007).¹³

Here, Bucio and Hernandez possessed the requisite degree of supervisory authority; were

¹³ The Employer's "vote No campaign" did not mitigate the tainting pro-union conduct of Bucio and Hernandez. In *SNE*, the Board, relying on *Harborside*, held that "higher management's antiunion stance can mitigate a supervisor's pronoun conduct under certain circumstances if management 'takes timely and effective steps to disavow' the conduct of pronoun supervisors." *SNE Enterprises*, 348 NLRB at 1043. However, an employer's general anti-union stance does not equate to a disavowal of a supervisor's pro-union conduct. *Id.* In *SNE*, the Board found, based on the lack of an explicit disavowal of the supervisors conduct, the employer's anti-union campaign did not mitigate the supervisors' conduct. *Id.* Here, there is no evidence that the Hotel ever disavowed the conduct of Bucio or Hernandez. As in *SNE*, the Hotel never mentioned -- much less disavowed -- the two supervisors' conduct and there is no mitigation of the taint their supervisory influence caused for voters.

first-line supervisors with control over employees' day-to-day work life; were engaged in repeated pro-union conduct that the Board has found objectionable in other cases, including the solicitation of union authorization cards; and their conduct materially affected the outcome of the election. As a result, Bucio and Hernandez's conduct tainted the elections and the elections should be set aside.

2. Bucio's Pro-Union Activity

From the outset of the organizing campaign, Bucio publicly identified herself as a Union supporter. Bucio's name and face appeared on at least two pro-union flyers that were distributed in the Hotel. (Ex. 8, 26:9-27:25). On the first flyer, her name and picture appeared along with other pro-union employees with the title "We're Voting Yes for the Union!" (*Id.* at 26:9-24, E. Hearing Ex. 1). The second flyer featured Bucio's picture, her title of "Housekeeping Supervisor," the Union's logo, and a heading that as a 30-year employee she rejected the Hotel's claims of being a "family." (*Id.* at 27:4-25, E. Hearing Ex. 2). Additionally, during the campaign she wore a pro-union button and participated in demonstrations outside of the Hotel. (*Id.* at 26:2-6). She maintained contact with Union organizers and reported the Hotel's activity to the Union organizers throughout the workday. For example, Bucio called Alba Meija, the Union organizer, on her cell phone during her shift to report the Hotel's campaign activities and to seek advice on how to respond. (*Id.* at 111:19-113:6). She would travel with groups of employees, including subordinates Francisca Paniagua and Guillermina Corona, to Union meetings. (*Id.* at 145:15-146:5).

In addition, Bucio attempted to convince employees to sign Union authorization cards. In early-February, Bucio repeatedly contacted Maria Lara Perez – calling her up to five times a day – pressuring her to join the Union. (*Id.* at 73:7-76:8). This behavior continued for roughly two weeks. (*Id.* at 81:11-23). Bucio told Perez that the Union would be good for employees and it would give employees better benefits. (*Id.* at 73:6-76:8.) She even asked Perez to sign a union authorization card. (*Id.* at 74:24-75:2; 85:20-24). Further, Bucio told Perez that once employees

voted for the Union, she (Bucio) would replace Rodriguez as the Housekeeping Manager. (*Id.* at 75:15-76:2). She also attempted to convince Perez to speak with Ana Sanchez in an effort to persuade Perez to support the Union. (*Id.* at 82:2-10).

Bucio's coercive pressure was not limited to Perez. She interrogated Theresa Tapia ("Tapia") about the Union and pressured her to support the Union. Specifically, Bucio went into a guest room that Tapia was cleaning, asked her to stop cleaning, pointed to her Union button and began espousing the benefits of joining the Union. (*Id.* at 113:7-25). Additionally, in response to a complaint Tapia made to Bucio about the number of double bed rooms Bucio was assigning her, Bucio responded to Tapia that if she would join Ana Sanchez in supporting the Union she might receive a better work assignment. (*Id.* at 194:22-195:20).

3. Bucio Unlawfully Tainted the Election

Bucio's repeated and pervasive pro-union conduct tended to coerce and interfere with the employee's exercise of free choice in the election. Bucio's authority to assign, responsibly direct work, and discipline broadly affected her subordinates' daily work lives in a manner that tended to interfere with employee free choice and tainted the election. *SNE Enterprises*, 348 NLRB at 1043; *Madison Square Garden*, 350 NLRB 117 (2007).

By soliciting Maria Lara Perez to sign a Union authorization card, Bucio engaged in pro-union supervisory conduct that tainted the election. (Ex. 8, 74:24-75:2; 85:20-24). As the Board in *Harborside* held "[S]upervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not. 343 NLRB at 911. Additionally, Bucio interfered with Perez's free choice by engaging in harassing conduct by calling Perez many times per day over a two-week period and questioning her about her Union

sympathies.¹⁴ (Ex. 8,73:6-76:8).

Bucio's threats and interrogation of Tapia were similarly unlawful. By stating Tapia would get a more favorable work assignment if she supported the Union, Bucio used her supervisory authority to interfere with Tapia's free choice and coerce her into supporting the Union. (*Id.*, at 195:13-20). Such statements demonstrate the supervisor's ability to affect the employees' work life and coerce the employee, interfere with free choice, and are unlawful under *Harborside*. Further, by interrogating and soliciting Tapia in private regarding the Union, Bucio also interfered with her free choice. *Madison Square Garden*, 350 NLRB 117. No statutory supervisor would be permitted to act in this way if they were advocating against union representation, and such behavior is seen as tainting the laboratory-perfect campaign conditions required by the Board. *See e.g. Seton Company*, 332 NLRB 979, 981 (2001) (a supervisor's interrogation of an employee about union support, and threats of onerous working conditions were coercive supervisory conduct). Moreover, retaliation by management is generally held to have a reasonable tendency to coerce employees' decision regarding union support. *See, B.J. Titan Service Co.*, 296 NLRB 668, 668 fn.2 (1989). Bucio's use of her supervisory position to advocate for union representation here is no different – she violated employees' Section 7 rights to make a decision regarding labor representation free of coercive supervisory interference.

In addition, by engaging in pro-union demonstrations and picketing at the facility, Bucio had the ability to obtain an illustration of who is “pro-union” and, by the process of elimination, who is not pro-union. (Ex. 8, 26:2-6). Employees who see their first-line supervisor picketing in

¹⁴ Bucio was not a credible witness. Despite participating in Union meetings, demonstrations, and a Union campaign that lasted at least four months, Bucio denied *ever* speaking to *any* coworkers about the Union. (Ex. 8, 132:5-12; 148:9-13). This is contrary to the evidence presented at the hearing, defies rational thought, and demonstrates her willingness to submit untruthful testimony. Specifically, she admitted to speaking to Maria L. Perez, attending Union meetings, and riding in the car with employees to Union meetings. (*Id.* at 148:5-149:1).

front of the Hotel do not forget the power the supervisor has over their work life and feel pressure to support the Union to remain in favor with Bucio, particularly if they believe Bucio's claim that if the Union wins, she will be in charge, and Rodriguez will be out. (*Id.* at 75:15-76:2). This pressure interfered with employee free choice and tainted the election. Further, Bucio's appearance on multiple campaign flyers – including one that identifies her as a supervisor, her pro-union button, and traveling with employees to Union meetings and Bucio's interference and coercion was widespread amongst the entire workforce, highly visible to employees – including her direct reports, and consistent throughout the organizing campaign. *See Madison Square Garden*, 350 NLRB at 118-119.

In *Harborside*, the Board relied on the “nature and extent of [the supervisors] conduct as a whole” in finding a violation. 343 NLRB at 913. Here, Bucio was an active leading voice in the Union's campaign including soliciting union authorization cards; using her supervisor authority to threaten employees with unfair workloads if they did not support the Union and promising better workload if the employee support the Union; interfering with employees' free choice by using her supervisory position on flyers and propaganda to garner Union support; participating in demonstrations; questioning multiple employees about their support of the Union; engaging in harassing conduct of subordinate employees; wearing union insignia; and traveling with subordinates to Union meetings. Tellingly, Bucio has purview over the assignment of work, and it is seniority and the assignment of work that motivated some to seek out a Union representative. (*Id.* at 174:21-24). Bucio's uncontroverted claim that she would be taking over the department when the Union prevailed was a powerful coercive message to the members of housekeeping looking for changes to be made in areas where Bucio had authority to make them for all members of the voting unit. Thus, Bucio's conduct, independently and aggregately, interfered with employee free

choice and compromised the election.

Bucio's supervisory pro-union conduct materially affected the outcome of the election. The Union prevailed in the Housekeeping election 10-5 – *a mere three-vote swing*. Given the direct harassment, solicitation, threats, and interrogation of two subordinate employees and the widespread and repeated nature of Bucio's conduct, her actions clearly affected the outcome of the election. Bucio's pro-union conduct began in early February and persisted throughout the campaign through harassment, threats, demonstrations, interrogations, flyers, meetings, and pro-union insignia. The demonstrations and flyers were public and seen by all employees including her departmental subordinates. Her vocal advocacy for the Union's campaign was well known. (*Id.* at 26:2-6). Further, one pro-union flyer prominently displayed her title of Housekeeping Supervisor, leaving Housekeeping employees with little doubt over where their supervisor stood on how they should vote. (*See, Id.* at E. Hearing Ex. 2).

4. Hernandez's Unlawfully Tainted the Election

Hernandez's name and picture appeared along with other pro-union employees on a flyer titled "We're Voting Yes for the Union!" (Ex. 8, 36:5-12, E. Hearing Ex. 1). He engaged in picketing, demonstrations, and other pro-union activity outside of the Hotel throughout the campaign. (*Id.* at 31:16-36:2; E. Ex. 3a, 3b). He even hosted multiple parties in support of the Union. (*Id.* at 31:24-3). Finally, he drove other employees in his department to Union meetings at the Union's facility in downtown Chicago. (*Id.* at 145:15-146:5).

As with Bucio, Hernandez's pervasive pro-union conduct tended to coerce the employees' exercise of free choice in the election. Hernandez's authority as a first-line supervisor to assign, responsibly direct work, and discipline broadly affected his subordinates' daily work lives in a manner that tended to interfere with employee free choice and tainted the election. *SNE Enterprises*, 348 NLRB at 1043; *Madison Square Garden*, 350 NLRB 117.

Employees who see their first-line supervisor picketing in front of the Hotel – especially those who work in other departments and rely on Hernandez’s discretion to schedule them for banquet events – are unlikely to forget the power the he has over their work life and feel pressure to support the Union to remain in favor with Hernandez. His conduct was public and inescapable to all employees, including his subordinates.¹⁵ Hernandez’s actions of interference and coercion were widespread amongst the entire workforce, visible to all employees – including his direct reports, and consistent throughout the organizing campaign. *See Madison Square Garden*, 350 NLRB at 118-119. As described above, Hernandez’s conduct, when taken together, establishes he interfered with employee free choice and compromised the election. *Harborside*, 343 NLRB at 913. Therefore, the RD’s departure from established Board precedent and erroneous factual determinations prejudiced the Employer and thereby raising a substantial question of law and fact regarding the validity of the election in these proceedings.

G. The RD’s Decision on the Union’s Promise of Benefits Raises a Substantial Question Concerning the Validity of the Election and Certification Based on the RD’s Departure from the Board’s Precedent and Clearly Erroneous Factual Determinations that Have Prejudiced the Hotel.

The RD created a substantial question of law by departing from Board precedent and made clearly erroneous factual finding prejudicing the Hotel in finding that the Union’s promise of diet pills and manicures, through payments made to Ana Sanchez, did not violate the Act. It is well established that a union’s “conditioning of the receipt of benefits on favorable election results is impermissible conduct” that warrants setting aside an election. *Crestwood Manor*, 234 NLRB 1097, 1097 (1978); *see also, Go Ahead North America, LLC*, 357 NLRB 77, 77 (2011) (“A union

¹⁵ Hernandez was also not a credible witness. He repeatedly denied *ever* speaking to *any* colleagues about the joining the Union during the organizing campaign. (Ex. 8, at 189:12-22). This cannot be believed. Given that he engaged in picketing and demonstrations outside of the Hotel on several occasions, drove employees to Union meetings where several other Hotel employees were present, and attended the pre-election hearing with several other members of the Hotel’s staff, his denial is particularly egregious. (*Id.*, at 31:16-36:2; E. Hearing Ex. 3a, 3b; 145:15-146:5).

cannot make, or promise to make, a gift of tangible economic value as an inducement to win support in a representation election”). The unlawfulness of the conduct lies with the inducement, not the actual receipt of the benefit. *Id.*

Here, in front of a determinative number of Housekeeping employees, Sanchez promised that when the Union won the election she would use the money she received from the Union to buy items and services for those who voted in favor of the Union. (Ex. 8, at 76:9-77:25; 91:5-13). The testimony of Perez on this point is uncontroverted.

Even the Hearing Officer credited the testimony of Maria Lara Perez that Sanchez, in the presence of Perez and three other Room Attendants, stated, “when the Union pays me, I am going to buy all of you diet pills and will take you to get your nails done.” (Ex. 5, p. 16; Ex. 8, at 76:9-77:25; 91:5-13). Without any objective evidence, the RD, in agreement with the Hearing Officer, determined that the comments were not an offer of a gift, but a remark intended to insult Perez. The RD’s interjection of hidden intent that has no basis in the record is clear error. (*See*, Ex. 1; Ex. 5, p. 17). This was not mentioned anywhere by any participant in the hearing, and should be rejected as unsupported conjecture. This clearly erroneous factual determination and abuse of discretion alone is sufficient grounds for granting review.

The fact that the Union did not use an organizing committee means nothing. Sanchez was not just a lead supporter as the Officer contends; she was a paid Union agent. While a paid relationship does not establish a per se agency relationship, it is further evidence that an agency relationship exists. *Local 300, Cosmetic and Novelties Workers' Union (Cosmetic Components Corp.)*, 257 NLRB 1335 (1981).

Moreover, this was not the only incident where Sanchez held herself out as the Union’s agent and stated that she was being paid by the Union to organize the Hotel. Sanchez also asked

employees if they wanted her to buy them sodas with what the Union was paying her and asked employees if they wanted to know how much the Union was paying her. (Ex. 8, 88:13-89:1). Further, employees believed that Sanchez was representing the Union and that Sanchez was a Union leader. (Ex. 8, 78:1-2; 134:17-19). Sanchez, as the leader and paid agent of the Union, held herself out in a manner that would cause employees to believe she had authority to act on behalf of the Union. Including the Union's promise of money to Sanchez, the Union promised at least five Housekeeping employees money, gifts, and/or services in exchange for a successful election. Only three votes are necessary to reverse the election result.

Therefore, the RD's departure from established Board precedent and erroneous factual determinations prejudiced the Employer and thereby raising a substantial question of law and fact regarding the validity of the election in these proceedings.

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Respectfully submitted,

By: /s/ Peter G. Fischer
Jay P. Krupin
jkrupin@bakerlaw.com
Peter G. Fischer
pfischer@bakerlaw.com
Michael Parente
mparente@bakerlaw.com
Baker & Hostetler LLP
Washington Square, Suite 1100
1050 Connecticut Ave. NW
Washington, DC 20036-5403
Telephone: 202.861.1500
Facsimile: 202.861.1783
*Attorneys for Davidson Hotel Company,
LLC*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 11, 2018, an electronic copy of this brief was filed electronically with the National Labor Relations Board. A copy was filed electronically with:

Peter Sung Ohr
Regional Director
National Labor Relations Board, Region 13
Dirksen Federal Building
219 South Dearborn St., Suite 808
Chicago, Illinois 60604
c/o Lori Brown
lori.brown@nlrb.gov

A Copy was sent by electronic mail to:

David Barber, Esq.
McCracken, Stemerma & Holsberry, LLP
595 Market St. Suite 800
San Francisco, CA 94105
dbarber@msh.law

/s/ Peter G. Fischer
Peter G. Fischer
Attorney for Davidson Hotel Company LLC